Supreme Court, U.S.
FILED

001865 MAY 29 2001

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

GEORGE LUIS GUTIERREZ,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JOSEPH A. CONNORS III
Counsel of Record
Texas Bar No. 04705400
605 E. Violet Ave., Suite 3
McAllen, TX 78502-5838
(956) 687-8217
(956) 687-8230 FAX

ATTORNEY FOR PETITIONER

50 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

APPEALS COURT'S OPINION 1

SENTENCING HEARING 5

APPEALS COURT'S JUDGEMENT AS MANDATE 20

TRIAL COURT'S JUDGEMENT 21

DEFENSE OBJECTIONS TO PRE-SENTENCE REPORT 36

PARTIES' NOTICE OF PLEA AGREEMENT 45

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40394
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE LUIS GUTIERREZ,

Defendant-Appellant.

Appeal from the
United States District Court
for the Southern District of Texas
(M-99-CR-546-1)

Filed February 28, 2001

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Defendant-Appellant George Luis Gutierrez appeals his sentence for conspiracy to possess with intent to distribute 1,540

---

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

CERT3:CERTAPP.GLG

kilograms of marijuana in violation of 21 U.S.C. §§ 846, 841 (a)(1), and 841(b)(1)(A). Gutierrez argues first that the district court erred when it increased his base offense level by four pursuant to U.S.S.G. § 3B1.1(a) for being the leader or organizer of a criminal activity that involved five or more participants or was otherwise extensive. Specifically, Gutierrez complains that the Presentence Investigation Report (PSR) improperly contains the conclusions of the DEA agents. The PSR contained more than the bald assertions and conclusions of the DEA agents and was sufficient to support a finding that Gutierrez was a leader or organizer. See United States v. Elwood, 999 F.2d 814, 817 (5th Cir. 1993). As Gutierrez presented no rebuttal evidence at sentencing, the district court was entitled to rely on the PSR in making its factual determinations. See United States v. Alford, 142 F.3d 825, 832 (5th Cir. 1998).

Gutierrez next contends that the district court erred when it enhanced his sentence pursuant to U.S.S.G. § 3B1.4 for the use of minors to commit a crime. We review the district court's factual findings for clear error. See United States v. Thomas, 120 F.3d 564, 574 (5th Cir. 1997). Gutierrez admitted at sentencing that his

wife and children were present with him while he supervised the transportation of marijuana. The district court could infer that Gutierrez had orchestrated the presence of his children in an attempt to give the appearance of a family traveling together and thereby avoid detection by law enforcement. Such an inclusion of children is a "use" of minors for purposes of § 3B1.4.

Gutierrez asserts next that application of § 3B1.4 violates the Ex Post Facto Clause because there is no evidence that he used his children after November 1, 1995, the effective date of this guideline. As Gutierrez did not raise this objection in the district court, our review is limited to plain error. See United States v. Navejar, 963 F.2d 732, 734 (5th Cir. 1992). Gutierrez pleaded guilty to a conspiracy that lasted until after the effective date of the subject guideline provision. Therefore, application of the guideline did not violate the Ex Post Facto Clause. See United States v. Buckhalter, 986 F.2d 875, 880 (5th Cir. 1993).

Finally, relying on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2362-63 (2000), Gutierrez argues that the district court erred when it enhanced his sentence as a career offender based on prior criminal history that was not alleged in the indictment and

submitted to the jury. Apprendi expressly states, however, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. Thus, Apprendi does not require that Gutierrez's prior convictions be alleged in the indictment. Moreover, Gutierrez's sentence of 292 months does not exceed the statutory maximum based on his criminal history, so Apprendi would not be applicable even absent its recidivism exception. See United States v. Doggett, 230 F.3d 160, 165 (5th Cir. 2000), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Jan. 4, 2001) (No. 00-7819); 21 U.S.C. § 841 (b)(1)(A).

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in McAllen

UNITED STATES OF

Case Number: 7:99CR00546-001

V. GEORGE LUIS GUTIERREZ

Proceedings, April 4, 2000:

THE COURT: M-99-546, United States versus George Luis Gutierrez.

MR. LEONARD: United States is present and ready.

MR. VEGA: Good morning, Judge. We are present and ready.

THE COURT: Mr. Gutierrez, have you had an opportunity to look at the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Other than what your attorney has addressed did you find anything wrong with it?

THE DEFENDANT: No, sir.

THE COURT: Other than what your attorney addressed.

THE DEFENDANT: Yes, sir.

THE COURT: Has counsel received the benefit of the

health evaluation?

MR. VEGA: We have, Your Honor.

THE COURT: Are you satisfied?

MR. VEGA: I am satisfied, Judge.

THE COURT: The Court is also satisfied.

Let's address your objections.

MR. VEGA: Yes, sir. Your Honor, the one we would like to urge at this time is the enhancement for the children, Your Honor.

THE COURT: For the what?

MR. VEGA: For the children, minor children. We are objecting, Your Honor. What we are saying, Your Honor--

THE COURT: Where is there an enhancement for minor children?

Let's start with your first objection.

MR. VEGA: Yes, sir.

THE COURT: Your first objection appears to involve enhancement as a career offender.

MR. VEGA: Yes, Your Honor.

THE COURT: And you are questioning the convictions

that were used --

MR. VEGA: Right.

THE COURT: -- to predicate the assessment that he is a career offender.

MR. VEGA: That is right.

THE COURT: Let me ask you this. Which ones -- making reference, starting on Page 12. All right. Which ones are you questioning as far as being convictions?

MR. VEGA: Your Honor --

THE COURT: Number 47, where he is 20-year-old, are you questioning that was a conviction?

MR. VEGA: You are on Page 12, Your Honor?

THE COURT: Yes.

MR. VEGA: 47, no, Your Honor.

THE COURT: You are not?

MR. VEGA: What we did --

THE COURT: That's a felony. No question about that.

MR. VEGA: There is no question about that.

THE COURT: All right, sir. Now, what about the one on 48, Number 48, Page 12, Item Number 48?

MR. VEGA: No, we are not questioning that, Your Honor. That's zero points on that.

THE COURT: But that's a conviction.

MR. VEGA: That is correct, Your Honor.

THE COURT: That's a conviction for a felony. Am I in error? Even in the State, if you get as many as four years probation, that's a felony, isn't it?

MR. VEGA: It is, Your Honor.

THE COURT: You can't get -- for non-felony you can't get four years probation, can you?

MR. VEGA: No, that's correct, Your Honor.

THE COURT: So that's a felony.

MR. VEGA: That is a felony.

THE COURT: What about Item Number 49? That's a felony, too, isn't it?

MR. VEGA: Yes, Your Honor.

THE COURT: All of those felonies up till now have involved drugs.

MR. VEGA: They have, Your Honor. He had a --

THE COURT: Let's go to Number 50, aggravated assault

on a piece (sic) officer. That's a felony, too, and that's a crime involving violence, isn't it?

MR. VEGA: It is, Your Honor. But what my client was telling me on this, the way it took place, he was handcuffed sitting down.

THE COURT: That may very well be. What I am asking is whether or not those are convictions.

MR. VEGA: It is, Your Honor

THE COURT: You are objecting to the proposition that they have characterized him as a career offender because of the convictions. My question is, is there any question or do you have any evidence to the contrary about the convictions that are recited in the report, itself?

MR. VEGA: No, Your Honor, my client in fact admitted those to probation.

THE COURT: Your objection is overruled, but you will preserve your exception in that regard. All right, sir.

Let's go to your next objection. Adjustment because they gave him, I believe, four points because of the fact that he was considered to be an organizer of more than four persons -- five

persons.

MR. VEGA: Right, Your Honor.

THE COURT: My question to the Government: Do you have any further evidence?

MR. LEONARD: No, Your Honor, other than what's already recited in the PSI report.

THE COURT: Do you have any further evidence?

MR. VEGA: That he used five or more persons, Your Honor?

THE COURT: Any further evidence so a determination can be made. Are you questioning what is contained in the presentence investigation?

MR. VEGA: We are, Your Honor.

THE COURT: All right, sir. Well, do you have to show -- let us go over the PSI, all right.

MR. VEGA: Yes, sir.

THE COURT: Let's go to the offense conduct and let's go to just one aspect of it. All right. Let's go to the offense conduct on Page Number 4 and follow me if you will. All right.

Are you questioning the assertions made on Page 4 and 5?

MR. VEGA: No, Your Honor.

THE COURT: Now, are you questioning the assertions made on Page 6, Item 16, Paragraph 16?

MR. VEGA: No, Your Honor.

THE COURT: Are you sure?

MR. VEGA: Positive. What we are questioning, Your Honor, is the enhancement.

THE COURT: Sixteen drivers. How would you not --

MR. VEGA: It wasn't all at the same time, Your Honor.

THE COURT: I understand that.

MR. VEGA: What we are questioning is the scope. This four-level increase is supposed to be a person who is the kingpin, someone in charge of an organization, where they have transporters, loaders. My client didn't do that. What he did, somebody would drive --

THE COURT: Let me ask it this way.

MR. VEGA: Yes, sir.

THE COURT: Which part or which paragraph do you have evidence to show to the contrary or do you disagree with in the offense conduct, which includes Pages 4, 5, 6, 7, 8, up through

9?

MR. VEGA: Your Honor, we don't disagree with the offense conduct. What we disagree with is the adjustment for this type of enterprise, Your Honor. Okay. We are asking for a two point reduction.

THE COURT: What you are telling me is that you don't have any further evidence and you don't necessarily disagree with the allegations contained in the presentence investigation. That being so, I am going to overrule your objection but you will preserve your exception in that regard.

Let's go to your next objection, all right, sir. The use of a minor.

Did he get points for use of a minor?

PROBATION OFFICER: Yes, he did, Your Honor.

THE COURT: What paragraph is that? Page 11?

PROBATION OFFICER: Page 11, Paragraph 39.

MR. LEONARD: And it is Paragraph 17 in the offense conduct, Your Honor.

THE COURT: That's what I want. They say that -- is there any question but that he would travel with his family on these

trips?

MR. VEGA: There is no question about that. Some of the trips did involve family.

THE COURT: Is there any question but that his children were with him at times?

MR. VEGA: At times, Your Honor, with children. There is no question there.

THE COURT: Now, any further evidence from the Government in regard to the issue whether or not the children were being used?

MR. LEONARD: No, sir.

THE COURT: Any further evidence from the defendant?

MR. VEGA: No, Your Honor.

THE COURT: Well, then, my question to you would be, why would he take his family if it was not to disguise or attempt to disguise the fact that he was transporting marijuana?

MR. VEGA: Well, Your Honor, on the trips the folks in front of him were transporting the marijuana and he was in back in another vehicle. He might have been there to disguise while he was supervising or something like that. What we are saying is, he did

not direct, command or encourage his children to participate.

THE COURT: Why would you take your children with you if you were involved in a marijuana transaction if you did not take them with you to try and sort of hide the fact that you were violating an offense?

MR. VEGA: Your Honor, he didn't have anywhere else to leave them. That's why he took them with him.

THE COURT: I disagree. Your objection in that regard is overruled but you will preserve your exception.

Let's go to your next objection, sir.

MR. VEGA: Your Honor, we are going to withdraw that objection, Your Honor.

THE COURT: Okay. The 1500 grams. Let's go to the next one. You are objecting to Pages 12 and 6. That's the criminal history we have already reviewed.

MR. VEGA: That's correct, Your Honor. Basically, we are asking the Court -- that he was over-represented to move him from a six to a five, Your Honor. That's what we are asking in that objection, but that has already been overruled.

THE COURT: I think so. Are you urging any other

objections?

MR. VEGA: No, Your Honor.

THE COURT: Any reason, subject to preserving your exceptions and your objections to the rulings of the Court regarding the contents of the presentence investigation, why the report should not be adopted?

MR. VEGA: Well, Your Honor, what we would tell the Court, Your Honor, is the co-defendant, which I believe had more involvement, more marijuana loads, greater amounts, received a sentence of 70 months, Your Honor. My client --

THE COURT: Who was the co-defendant?

MR. VEGA: Mr. Moreno, Your Honor, George Moreno. Just in the scope of it, Your Honor. It may not make a difference in this case.

THE COURT: The matters involving Mr. Moreno's sentence is not present before me.

MR. VEGA: Right. I understand.

THE COURT: Did he have the same kind of criminal history?

MR. VEGA: No, he did not, Your Honor, and that's the

difference. That is the difference.

THE COURT: He wasn't addressed as a career offender.

MR. VEGA: What we are asking the Court, Your Honor --

THE COURT: So that's a big distinction there.

MR. VEGA: It is, Your Honor. And my client understands that, Your Honor, and he understood that coming into this case. And he understands where he stood. He pled guilty, Your Honor, to this case. We are asking the Court to move him over from a six to a five, reduce it two point enhancement for the role and reduce two points for the children, Your Honor, and where that's going to put him is going to be two or three times more than anybody else received in the case.

He has tried to commit suicide while he was in the hospital, Your Honor. He has learned his lesson.

He has told me, "Look, it is not worth it. I want to go on with my life."

When he comes out, when he is 60 years old or is 50 years old, Your Honor, I don't think it is going to make a difference. I think he has already learned his lesson and it is going

to be sufficient time that he is going to receive in prison, Your Honor.

THE COURT: Anything else? Do you have anything to say to me before I decide what to do?

THE DEFENDANT: Excuse me, sir?

THE COURT: Do you have anything to say before I decide what to do?

THE DEFENDANT: I wrote some letters while I was in jail, how wrong I was doing, Your Honor. I am sorry to you, sir, your court, for what I have done wrong. I truly miss my wife and kids. And, well, anyway, while in am jail I will learn a trade, sir. I would like to do plumbing, so when I get out I will be a plumber, and maybe you will have a --

THE COURT: Some day you are going to get out.

THE DEFENDANT: Yes, sir.

THE COURT: You are still going to have a life ahead of you. There will be a lot of things you will be able to do. You can live a productive life, but that's up to you and nobody else. You understand that.

THE DEFENDANT: Yes, sir.

THE COURT: But I have to do what the law imposes upon me. You understand that.

THE DEFENDANT: Yes, sir.

THE COURT: You have to admit the conduct you have engaged in --

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: -- and your history is not the most serious history that can be reviewed. So it finally came to this. You understand that.

THE DEFENDANT: Yes, sir. The agents, they helped my wife at the end and I would like to thank them for doing it. They were very nice.

THE COURT: Very well. Anything else?

MR. VEGA: No, Your Honor.

THE COURT: Very well. Pursuant to the Sentencing Reform Act of 1984, I am going to commit you to the custody of the Bureau of Prisons for a period of 292 months.

I am also going to impose a five-year Supervised Release Term.

I am not going to impose a fine against you because of

your inability to pay but I am going to impose an assessment of $100 as required by law.

As justification for this sentence I am going to adopt all justifications which are included in this report and notice that your sentence does conform to the mandates of the Sentencing Guidelines and the agreements of the parties.

You discuss his rights of appeal.

MR. LEONARD: Government moves to dismiss the remaining counts.

THE COURT: Motion granted.

[PROCEEDINGS ADJOURNED]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40394
Summary Calendar

D.C. Docket No. M-99-CR-546-1

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

GEORGE LUIS GUTIERREZ,
Defendant - Appellant.

Appeal from the United States District Court for the Southern District of Texas, McAllen.

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: March 22, 2001

OP-S-J-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in McAllen

UNITED STATES OF AMERICA

V.

GEORGE LUIS GUTIERREZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 7:99CR00546-001

Oscar Vega
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 1 on December 6, 1999

[ ] pleaded nolo contendere to count(s)_____ which was accepted by the court.

[ ] was found guilty on count(s)_____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846, 841(a)(1) and 841(b)(1)(A)	Conspiracy to poss. with intent to distribute 1,540 kilograms of marihuana	10/31/1999	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)_____

[X] Count(s) 2, 3, 4 and 5 are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 467-45-2242

Defendant's Date of Birth: 09/20/1963

Defendant's USM No.: 91156-079

Defendant's Residence Address:
1720 Rosewood
Mission TX 78572

Defendant's Mailing Address:
1720 Rosewood
Mission TX 78572

April 4, 2000
Date of Imposition of Judgment

/s/ Filemon B. Vela
Signature of Judicial Officer

FILEMON B. VELA
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

May 02, 2000
Date

DEFENDANT: GEORGE LUIS GUTIERREZ
CASE NUMBER: 7:99CR00546-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 292 month(s).

[x] The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in an institution where he can receive drug and/or alcohol abuse treatment and/or counseling.

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district

[ ] _____ on _____
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] by 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

BY: _____

Deputy U.S. Marshal

DEFENDANT: GEORGE LUIS GUTIERREZ
CASE NUMBER: 7:99CR00546-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the

commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The

[X] See Special Conditions of Supervision-Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in

criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U.S.C. § 2248, 2259, 2264, 2327, 3663, 3663A, and/or 3664. The defendant shall also pay the assessment imposed in accordance with Title 18 U.S.C. § 3013;

15) the defendant shall notify the U.S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

SPECIAL CONDITIONS OF SUPERVISION

The defendant is hereby placed on notice that the court is quite concerned there has been an alarming increase of Driving While Intoxicate and illicit drug violations by persons sentenced by this court to probation or supervised release. Such violations are criminal offenses which would cause mandatory revocation of Probation/Supervised Release and subject to consequences thereof.

DEFENDANT: GEORGE LUIS GUTIERREZ
CASE NUMBER: 7:99CR00546-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$100.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement ..... $_____

FINE

[ ] The above fine includes costs of incarceration and/or supervision in the amount of ..... $ 0.00.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$0.00	$0.00	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GEORGE LUIS GUTIERREZ
CASE NUMBER: 7:99CR00546-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately; or
B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or
C [ ] not later than _____; or
D [ ] in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or
E [ ] in _____ (e.g. equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, ATTN: Finance, P.O. Box 5059, McAllen, Texas 78502

[ ] Joint and Several

Case Number (Including Defendant No.)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

DEFENDANT: GEORGE LUIS GUTIERREZ
CASE NUMBER: 7:99CR00546-001

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 35
Criminal History Category: VI
Imprisonment Range: 292 to 365 months
Supervised Release Range: __ to 5 years
Fine Range: $ 20,000.00 to $ 4,000,000.00

[x] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because

the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial or no restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[x] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

as stated on the record.

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.
[ ] for the following specific reason(s):

§ 3B1.4. **Using a Minor to Commit a Crime**

If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels.

Commentary

Application Notes:

1. "Used or attempted to use" includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.

2. Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor.

3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	M-99-CR-546-01
GEORGE GUTIERREZ	§	

Filed February 2, 2000

DEFENDANT'S OBJECTIONS
TO THE PRE-SENTENCE REPORT

TO THE HONORABLE JUDGE, UNITED STATES COURT, FOR THE SOUTHERN DISTRICT OF TEXAS, MCALLEN DIVISION:

COMES NOW, GEORGE GUTIERREZ, Defendant in the above-referenced cause, by and through his attorney of record, OSCAR VEGA, and files this his Objections to the Pre-Sentence Report and in support thereof would respectfully show unto Court:

OBJECTION NUMBER ONE: Paragraph 42 of the Pre-Sentence Investigation Report, Page 11 Chapter Four Enhancements. Defendant objects for the following reasons:

I.

The Pre-Sentence Investigation report reflects that the Defendant is a career offender within the meaning of U.S.S.G. §

4B1.1. A Defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

II.

The Defendant is not able to determine which felony convictions the government is relying on to establish a career offender status. The allegations are vague and should be more specific. The Defendant has not been convicted with two crimes of violence as defined in § 4B1.2(a) or one controlled substance offense as defined by § 4B1.2(b).

The controlled substance offense's that the Defendant has been convicted of do not prohibit the manufacture, import, export, distribution, or dispensing of a controlled substance or the possession of a controlled substance with intent to manufacture, import, distribute, or dispense. In the delivery of marijuana offenses, the Defendant was convicted as a party to the offense

similar to a conspiracy offense in federal court. Thus, the delivery of marijuana offenses do not meet the criteria set forth in § 4B1.1.

The Defendant asserts that the aggravated on a police officer conviction was not based on violence. The defendant admits to pleading guilty because his probation was going to be revoked on another case and he was afraid that his sentences could run consecutive. In Determining whether defendant committed crime of violence for purposes of career offender provisions of Sentencing Guidelines, the Court may consider his specific conduct that resulted in conviction.

III.

It is the government's burden to prove career offender status. This defendant is requesting that this honorable court require the government to prove each and every element of a career offender status.

The Defendant request that this honorable court grant this Defendant's objection and reduce the offense level.

OBJECTION NUMBER TWO: Paragraph 38 page 11 of the Pre-Sentence Investigation Report——Adjustment for Role in the Offense. The Defendant objects for the following reason.

I.

The Pre-Sentence Investigation Report reflects that the Defendant is seen as an organizer or leader of a narcotics organization.

II.

In U.S.S.G. § 3B1.1, background, The sentencing commission provided different rages (sic) of adjustments to increase the offense level based upon the size of a criminal organization and the degree to which the defendant was responsible for committing the offense. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility. In relatively small criminal enterprises that are not other wise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than is (sic) larger enterprises that tend to have clearly delineated divisions of responsibility.

III.

The Defendant did not manage five or more participants. In the Defendant's case the government has confused the defendant's

involvement with other ongoing conspiracies. The same persons that the defendant was involved in smuggling marijuana were also involved with each other without the defendant's participation. The government has evidence that proves that the co-defendant Moreno was involved with the co-defendant Jones and the co-defendant Steele which were actually three conspiracies all together.

The defendant did not occupy a position of leader or organizer of an extensive organization. The defendant's method of operation was to stuff marijuana in a spare tire and cross the Falfurias checkpoint. The government has no evidence to prove that the defendant's operation is to be considered extensive in scope or in planning or preparation.

The defendant did not claim a larger share to the fruits of the crime. The defendant has borrowed several millions of dollars in an effort to establish a real estate developing company. The defendant has been successful in his efforts which are not to be confused with any drug profits as alleged by the government.

IV.

The Defendant respectfully requests that this honorable Court find that the Defendant is not a organizer or leader and the (sic)

reduce the adjustment for the role in the offense from 4 to 2 levels.

OBJECTION NUMBER THREE: Paragraph 39 of the Presentence Investigation Report, Page 11——Adjustment for use of minor to commit a crime. Defense objects for the following reasons:

I.

The defendant has been accused of using a minor to commit a crime as defined in §3B1.4. The term used or attempted to use includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.

II.

The defendant asserts that his minor children were never used to commit a crime as defined in §3B1.4. The minor children were never directed, commanded, encourage, intimidated, counseled, trained, recruited or solicited to committed a crime.

III.

The Defendant respectfully requests that this Honorable Court find that the defendant did not use a minor to commit a crime.

OBJECTION NUMBER FOUR: Paragraph 35 of the Presentence Investigation Report, Page 10, 11——Base offense level.

The defendant has been held responsible for at least 1,500 kilos of marijuana.

II.

The defendant asserts that he should be held responsible for at least 700 kilos but not more than 1000 kilos of marijuana. The government is attempting to hold the defendant responsible for several loads of marijuana which were committed by co-defendants involved in other conspiracies which do not involve this defendant.

III.

The Defendant respectfully request that this Honorable Court find that the defendant is responsible for at least 700 kilos of marijuana but not more than 1000 kilos and that the base offense level be reduced to 30.

OBJECTION NUMBER FIVE: Paragraph 45-59 of the Pre-sentence Investigation Report, Page 12-16——Defendant's criminal history.

I.

In paragraph 47, the offense is to remote and should not be considered.

In paragraph 50, the defendant was sentenced along with the case

described in paragraph 47, the defendant criminal history score with (sic) be duplicated if this conviction is counted.

In paragraph 53, the defendant was not represented by counsel and this conviction should not be counted in his criminal history score.

In paragraph 58, the defendant denies being on probation in case number CR-1502-97-D. While offense was committed.

The Defendant's criminal history is over represented. This defendant requests that this honorable court grant this objection and reduce the criminal history above.

OBJECTION NUMBER SIX: Paragraph 14-18 of the Pre-sentence Investigation Report, Page 5-7——Facts of the case

I.

The defendant objects to paragraph 14 in reference to the amount of marijuana. The defendant disputes the amount of marijuana attributed to him.

The defendant objects to the number of drivers that are attributed to him.

The defendant objects to paragraph 17 which states that the defendant used his minor children to commit a crime.

The defendant objects to paragraph 18 which states that the

defendant operated a fictitious real estate business.

WHEREFORE, PREMISES CONSIDERED, Defendant prays this Honorable Court grant his Objections.

Respectfully submitted,

/s/_____
OSCAR VEGA
Attorney for Defendant
1401 W. Polk Avenue
Pharr, TX 78577
(956) 630-1970
State Bar No. 00786309

CERTIFICATE OF SERVICE

I, OSCAR VEGA, hereby certify that a true and correct copy of Defendant's Objections to the Pre-sentence Report was forwarded the Assistant U.S. Attorney and probation officer in this matter at the Federal Building, McAllen, Texas presently assigned to this case on this the 2nd day of February, 2000.

/s/_____
OSCAR VEGA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	M-99-546-01
	§	
GEORGE LUIS GUTIERREZ,	§	
Defendant	§	

Filed January 3, 2000

NOTICE OF PLEA AGREEMENT

COMES NOW the United States of America, hereinafter referred to as "the Government," by and through its United States Attorney for the Southern District of Texas and its Assistant United States Attorney assigned to this matter, and would respectfully show the Court that the Government and the Defendant have entered into the following plea agreement:

1. The Defendant agrees to plead guilty to County ONE of the indictment;

2. The Government will recommend:

   A. that the Defendant be sentenced at the low end of the applicable guidelines;

B. that the Defendant be given maximum credit for acceptance of responsibility;

C. that the remaining counts of the indictment be dismissed as to this defendant at the time of sentencing.

The defendant is aware that the defendant's sentence will be imposed in accordance with the Sentencing Guidelines and Policy Statements. The defendant nonetheless acknowledges that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offense(s) to which the defendant pleads guilty. The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Knowing that, the defendant waives the right to appeal the sentence (or the manner in which it was determined) if such sentence is within the guidelines range as determined by the Court. This agreement does not, however, affect the rights of the defendant to appeal an illegal sentence as set forth in Title 18, United States Code, Section 3742(a). Nor does this agreement affect the rights of the defendant to appeal based upon allegations of ineffective assistance of counsel or prosecutorial misconduct.

This document states the complete and only Plea Agreement

between the United States of America and the Defendant, and is binding only on the parties to this agreement, and it supersedes all prior understandings, if any, whether written or oral, and cannot be modified other than in writing and signed by all parties or on the record in Court. No other promises or inducements have been or will be made to the Defendant in connection with this case, nor have any promise or threats been made in connection with this plea.

ACKNOWLEDGMENTS

I have read this agreement and carefully reviewed every part of it with my attorney. If I have difficulty understanding the English language, I have had a person fluent in the Spanish language interpret this agreement to me.

Date: 12-1-99 Defendant: /s/_____

I am the Defendant's counsel. I have carefully reviewed every part of this agreement with the Defendant. I certify that this agreement has been translated to my client by a person fluent in the Spanish language if my client is unable to read or has difficulty understanding the English language.

Date: 12-1-99 Defendant: /s/_____

For the United States of America:

MERVYN M. MOSBACKER
United States Attorney

/s/
Jaime A. Pena
Assistant United States Attorney

APPROVED BY:

/s/
Michael F. McCormick
Assistant United States
Attorney in Charge